DATE 1966	FILINGS—PROCEEDINGS
7-11	Received application for leave to proceed in forma pauperis with the filing of notice of appeal.
10-25	3. Filed Memorandum and Order Allowing Appeal in Forma Pauperis. (TJM) Filed letter to Judge McBride. Reg. Ordered that petitioner be allowed to proceed with his appeal without prepaymento of fees and costs and giveing of security therefor. (TJM) 4. Filed Application For Leave To Proceed In Forma Pauperis
11-18	Mailed Record To Clerk, Ninth Circuit Court of Appeals.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SACRAMENTO, CALIFORNIA

Case # Cr 13611

ADOLPHO RODRIGUEZ, ETTA MAE RODRIGUEZ, ALBERTO AMARO, JUAN BARACAN, APPELLANTS

vs

UNITED STATES OF AMERICA, APPELLEE.

NOTICE OF APPEAL

TO: THE ABOVE ENTITLED COURT;
GREETINGS:

Comes now ADOLPHO RODRIGUEZ and the above named appellants, who were convicted and sentenced on June 20, 1963 in the above captioned Court by the Honorable Judge McBride;

Appellant gave oral notice of appeal.

Appellant is herein giving formal notice of appeal to the U.S. Court of Appeals for the Ninth Circuit, that bill of exceptions, warrants of arrest, and all the trial transcripts be forwarded to said court of appeals located in San Francisco, California.

That same be filed as notice of appeal according to rules on appeal in all such matters.

POINTS RAISED ON APPEAL

That appellants were arrested in violation of Constitutional Guarantees of Fourth Amendment, and Section 3109, Title 18, U.S.C.A.

That there was insufficient evidence at trial to convict appellants.

That appellants are held in violation of the Fourteenth and Fifth Amendments of Constitutional guarantees.

Respectfully Submitted

/s/ Adolpho Rodriguez
ADOLPHO RODRIGUEZ
Appellant

Subscribed and Sworn to Before
Me This 7th Day of August, 1963

/s/ [Illegible]

U. S. Penitentiary Parole Officer
Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

—oOOo—

Cr. No. 13611

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ADOLPHO RODRIGUEZ, ETTA MAE RODRIGUEZ, ALBERTO MORALES AMARO, RAMON AMARO VILLA, JUAN BAUTISTA BARRAGAN, and FRANCISCA DE GONTES CEJA, DEFENDANTS

Original Filed August 22, 1963
Clerk, U. S. District Court

MEMORANDUM AND ORDER

Adolpho Rodriguez, one of the defendants herein, has submitted to this Court a motion for permission to proceed in forma pauperis with an appeal from the Judgment entered in this case on June 20, 1963.

Federal Criminal Procedure Rule 37 (a) states a mandatory requirement that notice of appeal be filed within ten days aft r entry of Judgment. Compliance with this requirement is essential to the jurisdiction of the Court of Appeals. *United States* vs. *Robinson*, 361 U.S. 220 (1961).

The record contains no written notice of appeal within the prescribed ten day period. Petitioner claims that he gave oral notice of appeal, but such notice is insufficient to satisfy Rule 37 (a), which requires a signed writing. F.R. Crim. P. 37(a)(1). *Durel* vs. *United States*, 299 F. 2d 583 (5th Cir. 1962). Thus, petitioner has not complied with a mandatory prerequisite for perfecting an appeal to the Court of Appeals.

Leave to appeal in forma pauperis is not a right, but a privilege, the granting of which is in the sound discretion of the court to which the application is directed. *Adkins* vs. *DuPont*, 335 U.S. 331 (1948). Inasmuch as

the petitioner has not complied with a mandatory prerequisite for perfecting his proposed appeal and the said appeal is, therefore, futile, this Court will deny the motion for permission to proceed in forma pauperis therewith.

IT IS, THEREFORE, ORDERED that petitioner's motion for permission to appeal in forma pauperis from the Judgment entered in this case on June 20, 1963, be, and the same is, hereby denied.

DATED: August 22, 1963.

THOMAS J. MACBRIDE
United States District Judge

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
SAN FRANCISCO, CALIFORNIA

Cr. No. 13611

ADOLPHO RODRIGUEZ, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

Received, Oct. 31, 1963, Frank H. Schmid, Clerk

AFFIANT IN FORMA PAUPERIS

TO: The above entitled Court, Honorable Justice Chambers thereof;

Adolpho Rodriguez having been duly sworn, according to law, deposes and says:—

That he is the petitioner named in the attached motion, and is a citizen of the United States of America, presently confined in the United States Penitentiary known as McNeil Island, located in the State of Washington, County of Pierce, and whose mailing address is P. O. Box 1000, Steilacoom, Washington.

That due and by virtue of said imprisonment he is without money whatsoever and has no means of obtaining the statutory fee required for filing his motion with which he moves this Court.

That he is wholly without money or property, real or personal, upon which process may issue, he having paid retained counsel for criminal trial purposes the cash sum of $2,500.00 and the following described property, to wit:

1.—One 1949 Chevrolet two ton truck.
2.—One 1954 Chevrolet pickup truck.
3.—One 1953 Chevrolet bus.
4.—One 1952 Cadillac automobile.
5.—Brothers-In-Law—$250.00.

All of which were included as attorneys fees at time of trial.

Affiant further submits that personal property of the value of $1,400.00 was left in trust with C. W. Carpenter, the Sheriff of Yuba City, Sutter County, California, who has failed properly to surrender the proceeds of said personal property to affiant, and by virtue of which your affiant is a poor and indigent person, and a pauper.

Wherefore, it is respectfully submitted and prayed that this Honorable Court waive the costs of filing fees upon the grounds herein above set forth.

Respectfully submitted,

/s/ Adolpho Rodriguez
Affiant

Subscribed and Sworn to Before Me
This 24th Day of October, 1963

/s/ [Illegible]

U. S. Penitentiary Parole Officer
Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
SAN FRANCISCO, CALIFORNIA

Re: Cr. No. 13611

In the Matters of:—Ex Parte

ADOLPHO RODRIGUEZ, PETITIONER

vs

UNITED STATES OF AMERICA, RESPONDENT

Received, Oct. 31, 1963, Frank H. Schmid, Clerk

MOTION

TO: The above entitled Court; Honorable Justice Chambers, et al; and to the respondents herein;

Comes now Adolpho Rodriguez, the petitioner herein above named and hereafter referred to as petitioner, and respectfully moves this Honorable Court for an order to issue permitting and appeal to be filed for cause.

That said motion is made under the requirements of law pursuant to statute in such cases as defined by the United States Code and Rules of Appeal, and that said motion is herein made as a requirement of justice guaranteeing to an accused person the constitutional right to appeal in criminal cases as the one at bar.

Petitioner herein invokes and calls upon this Court for the protection of his appeal rights where an appeal has been defaulted through no fault of petitioner, and where the sentencing Court refuses to correct default; and where because of special circumstances, use of habeas corpus as an aid to an appeal over which Circuit Courts of Appeals has jurisdiction may fairly be said to be reasonably necessary in the interests of justice.

STATEMENT OF MATTERS AND LAW INVOLVED

Since justice can be given effect only through the [illegible]cation of rules, the fundamental principles of application of rules are given to a particular situation in criminal cases.

It is the Courts duty to determine in this case if the particular rules applied by the Court where sentence was

passed and where an appeal has been denied were the right rules, and whether they were correctly applied, or whether or not different rules affecting rights to appeal should have been applied.

BRIEF STATEMENT OF FACTS

Petitioner, Adolpho Rodriguez, was convicted in the United States District for the Northern District, Northern Division of California, at Sacramento, having been charged with the crime of narcotics, eleven counts. The accused entered a not guilty plea on eleven counts and was convicted by jury on the 20th day of June, 1963.

Petitioner was represented throughout his trial by counsel of his own choice, having paid said counsel a fee of $2,500.00, a 1949 Chevrolet two ton truck, a 1954 Chevrolet pickup truck, a 1953 Chevrolet passenger bus, a 1952 Cadillac automobile, and his brothers-in-law gave him $250.00.

At time of sentence petitioner was denied a motion for a new trial and was sentenced to a term of twenty (20) years. Petitioner was charged and tried with Roberto Amaro, Juan Barragon, other co-defendants on the same charge, one of whom was his wife, Etta Rodriguez. All were convicted and sentenced to terms in prison. Petitioner now makes this motion in his own behalf (Ex Parte) "Rodriguez."

At time of sentence petitioner informed his counsel that he desired to appeal his case, believing that he was framed while in the county jail awaiting a hearing on another different and distinct charge having no connection with the present narcotic conviction, and that his belief that he was framed by police on a false narcotics charge stems from the fact that while he was being held in the county jail for hearing in another matter the police planted an informer in petitioner's cell to make an acquaintance and to frame him after he was released from jail.

At time of sentence, and after petitioner informed his attorney of his desire to appeal, an oral notice of appeal was made in court at that time.

Petitioner was then held in the county jail to await transfer to the United States Penitentiary, having been

held for a period of thirty (30) days, before transfer was made. Petitioner is now confined in the United States Penitentiary at McNeil Island, located at mailing address known as Box 1000, Steilacoom, Washington, County of Pierce, where he has remained ever since.

Petitioner is a layman having no knowledge of law and procedure and believed that his attorney would handle all legal matters pertaining to his appeal application, and was awaiting word from the Appellate Court regarding such appeal.

On or about the 7th day of August, 1963 petitioner wrote to the Court wherein he was sentenced requesting information as to his appeal, stating to the Court that he had given oral notice of appeal at time of sentence.

In reply by letter dated August 23rd, the clerk of the court advised petitioner that he had not filed written notice of appeal (See Exhibit A) thereto attached and made a part of this petition.

Petitioner learned for the first time that such written notice of appeal is a requirement under rules of appeal, and has now learned for the first time that his attorney's services terminated at the conclusion of trial and sentence.

Petitioner has a just and good cause for appeal and his appeal was taken in good faith, and now complains that he has a defense and cause to be heard and no one to hear it.

Wherefore, petitioner prays this Honorable Court to issue an order directed to sentencing Court, setting aside default and permitting petitioner permission to perfect and present his appeal before this Court, or to grant filing habeas corpus within the jurisdiction of the Ninth Circuit Court of Appeals.

Particular attention is called to this Court regarding the wording of a letter petitioner received from the clerk of the sentencing Court regarding "privilege" of appeals. (See Exhibit A).

In this connection petitioner submits the following:—

Article Fourteen (14), of the Amendments to the United States Constitution since the Bill of Rights reads in part, to wit:—

"—All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside. No state shall make or *enforce any law* which shall abridge the *privilege* or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within it's jurisdiction the *equal protection of the laws.*"

An appeal is in the category of the constitutional provisions of equal protection of the laws. If they could deny *one* person an appeal and allow *others* to appeal, this is not equal protection of the law.

His "privilege" to appeal infers that he had a *privilege* to appeal his case within the ten (10) day limit—but because he thought his attorney took care of everything and caused him to default his appeal was no fault of petitioner, and under these circumstances the Court will restore his appeal rights under the constitutional provision cited above.

(Supreme Court Reporter 317 U.S. at Page 236)

The writ of habeas corpus may be used as a substitute for an appeal where, because of special circumstances, use of the habeas corpus as an aid to an appeal over which Circuit Courts of Appeals has jurisdiction may fairly be said to be reasonably necessary in the interests of justice. The writ is available to Circuit Courts of Appeals.

Respectfully submitted,

/s/ Adolpho Rodriguez
Petitioner

Subscribed and Sworn to Before Me
This 24th Day of October, 1963

/s/ [Illegible]

U. S. Penitentiary Parole Officer
Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

* * * *

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Misc. 1806

ADOLPHO RODRIGUEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MEMORANDUM AND ORDER—Filed November 18, 1963

Petitioner, a federal prisoner, failed to file a timely notice of appeal from his conviction although an oral notice of appeal was noted by his attorney at the time of his sentencing. He seeks an order extending the time for filing an appeal or in the alternative a writ of habeas corpus.

An oral notice of appeal by attorney at time of sentencing is not sufficient compliance with Rule 37(a) of Federal Rules of Criminal Procedure. See *United States* vs. *Isabella*, 251 F.2d 223 (2nd Cir.), and *Durel* vs. *United States*, 299 F.2d 583 (5th Cir.).

The petition for extension of time to file an appeal is denied for lack of jurisdiction. *United States* vs. *Robinson*, 361 U.S. 220.

Treating the petition as an application for a writ of habeas corpus directed to me it is denied. Habeas corpus cannot substitute for an appeal. *Adams* vs. *United States, ex rel., McCann*, 317 U.S. 269.

/s/ Homer T. Bone
/s/ Richard W. Chambers
United States Circuit Judges

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

ATTACKING A SENTENCE IMPOSED BY THAT COURT

Case No. 9670
(To be supplied by the Clerk of the District Court)

See also Crim. 13611

ADOLPHO RODRIGUEZ # 30275
Full name and prison number of petitioner

vs.

UNITED STATES OF AMERICA
Name of respondent

MOTION PURSUANT TO SECTION 2255 OF TITLE 28
UNITED STATES CODE—Filed February 15, 1966

INSTRUCTIONS—READ CAREFULLY

In order for this motion to receive consideration by the District Court, it shall be typewritten (unless it is affirmatively made to appear that typing facilities are not available), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every motion under sec. 2255 of Title 28, United States Code, must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the motion is made *in forma pauperis*, it shall include an affidavit (attached at the back of the form)

setting forth information which establishes that petitioner will be unable to pay the fees and costs of the 2255 proceedings. When the form is completed, *the original and one copy* shall be mailed to the Clerk of the U. S. District Court for the Northern District of California, Northern Division, 650 Capitol Avenue, Sacramento, California.

1. Place of detention United States Penitentiary, McNeil Island, Washington

2. Name and location of court which, and name of judge who, imposed sentence U. S. District Court, Sacramento, California—Thomas J. MacBride

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) Indictment No. 13611
   (b) Violation of Federal Narc. Laws.
   (c) .....

4. The date upon which sentence was imposed and the terms of the sentence:
   (a) June 20, 1963.
   (b) 20 years
   (c) .....

5. Check whether a finding of guilty was made
   (a) after a plea of guilty .....
   (b) after a plea of not guilty X .....
   (c) after a plea of nolo contendere .....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury X .....
   (b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence?

8. If you answered "yes" to (7), list
   (a) The name of each court to which you appealed:
   I. .....
   II. .....
   III. .....

(b) the result in each court to which you appealed:

I. .....

II. .....

III. .....

(c) the date of each such result:

I. .....

II. .....

III. .....

(d) if known, citations of any written opinions or orders entered pursuant to such results:

I. .....

II. .....

III. .....

9. State concisely the grounds on which you base your allegation that the sentence which was imposed on you is invalid:

(a) I was "defrauded of my "known right" to appeal by retained trial counsel, Paul J. Melee.

(b) .....

(c) .....

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) It is well settled that an appeal from the judgment of a Federal District Court in a criminal case is a matter of right. *Coppedge* v. *United States*, 369 U.S. 438, 82 S.Ct. 917. It is also well settled that the sentencing court has discretion to ascertain whether a petition under Section 2255, presents a substantial question be-

(b) fore granting a full evidentiary hearing. *Sanders* v. *United States*, 373 U.S. 1, 20-21, 83 S.Ct. 1068 and *Moore* v. *United States*, 334 F.2d 25.

The standard required of employed counsel in a criminal case was set out in *Kennedy* v. *United States*, 259 F.2d 883 and it was held that a defendant is bound by acts of his counsel unless

(e) misconduct of counsel amounting to a breach of his legal duty to faithfully represent his client's interests is alleged and proven.

In the case at bar, the record will reflect that petitioner gave oral notice of appeal. Thereafter, petitioner's retained trial counsel failed to file a written notice of appeal in compliance with Rule 37 (a) (1), Federal Rules of Criminal Procedure, thereby "defrauding" petitioner of his "known right" to appeal. *Calland* v. *United States*, 323 F.2d 405.

It is to be observed that petitioner is of mexican decent, a citizen of the United States of America, who could not communicate in the English language (read, write or speak) at the time judgment was imposed. Petitioner was also incarcerated, without funds or the technical knowledge with which to exercise his "known right" of appeal. Thus, when trial counsel failed to file a written notice of appeal, after oral notice had been given, with the knowledge that petitioner could not comply with Rule 37 (a) (1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud.

Petitioner was transported to the United States Penitentiary, where he is presently confined, to commence service of his sentence, with the sincere belief that his judgment of conviction was, in fact, on appeal.

Petitioner has diligently studied the English language during these past two years of incarceration, in order that he may effectively seek judicial redress in this matter.

WHEREFORE, based upon the foregoing, and all the records and files heretofore had in this matter; the attached exhibits; the edict of *Dillane* v. *United States*, 350 F.2d 732 (1965), and *Camp* v. *United States*, 352 F.2d 800, it is respectfully submitted that petitioner was defrauded by retained trial counsel of his "known right"

of appeal and that this Honorable Court vacate and set aside his judgment of conviction so that he would be restored to the status of one whom sentence has just been imposed, and who has ten (10) days in which to institute a direct appeal. In re-sentencing petitioner respectfully requests that this Honorable Court consider the time petitioner has already served.

Respectfully submitted,

/s/ Adolpho Rodriguez
ADOLPHO RODRIGUEZ

11. Have you previously filed petitions for habeas corpus, motions under section 2255 of Title 28, United States Code, or any other applications, petitions or motions with respect to this conviction? .....

12. If you answered "yes" to (11), list with respect to each petition, motion, or application

(a) the specific nature thereof:

I. Motion to proceed on appeal in forma pauperis

II. .....

III. .....

(b) the name and location of the court in which each was filed:

I. U. S. District Court, Northern District of Calif., Northern Division (see attached exhibit "A")

II. .....

III. U. S. Court of Appeals for the Ninth Circuit (see attached exhibit "B")

(b) the disposition thereof:

I. Denied

II. Denied

III. .....

(d) the date of each such disposition:

I. August 22, 1963
II. November 18, 1963
III. .....

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

I. .....
II. .....
III. .....

13. Has any ground set forth in (9) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under section 2255 of Title 28, United States Code, or any other petition, motion or application? No.

14. If you answered "yes" to (13), identify

(a) which grounds have been previously presented:

I. .....
II. .....
III. .....

(b) the proceedings in which each ground was raised:

I. .....
II. .....
III. .....

15. Were you represented by an attorney at any time during the course of

(a) your aggarigment and plea Yes. .....
(b) your trial, if any Yes. .....
(c) your sentencing Yes. .....
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence .....
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed No. .....

16. If you answered "yes" to on or more parts of (15), list

(a) the name and address of each attorney who represented you:

I. Paul J. Melee, Sacramento, California
II. .....
III. .....

(b) the proceedings at which each such attorney represented you:

I. Plea
II. Trial
III. Sentence

17. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? Yes

/s/ Adolpho Rodriguez
Signature of Petitioner

)
) ss:
)

ADOLPHO RODRIGUES, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Adolpho Rodriguez
Signature of Affiant

Subscribed and Sworn to before me
this 17th day of January, 1966

/s/ [Illegible]

Parole Officer, U. S. Penitentiary, McNeil Island, Pierce County, Washington. Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

—oOo—

Civil No. 9670

ADOLPHO RODRIGUEZ, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

Original Filed, Jun. 27, 1966, Clerk, U. S. Dist. Court

MEMORANDUM AND ORDER—June 27, 1966

Petitioner, a prisoner in custody under sentence of this Court, has filed a petition herein under the provisions of Title 28 U.S.C. § 2255, wherein he requests that his judgment of conviction be set aside "so that he would be restored to the status of one whom sentence has just been imposed, and who has ten (10) days in which to institute a direct appeal."

Oral notice of appeal was given at the time of sentencing, but petitioner's trial counsel failed to file a written notice of appeal, as provided by Federal Criminal Procedure Rule 37 (a). Petitioner alleges: "Thus, when trial counsel failed to file a written notice of appeal . . . with the knowledge that petitioner could not comply with Rule 37 (a) (1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud."

The foregoing statement is petitioner's sole ground for relief. He does not assert that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which loss he is entitled to a remedy under § 2255. Petitioner has not, beyond the above conclusory statement, disclosed to this Court the nature of the error and prejudice which he proposes by appeal to correct. Consequently, there is no way in which this Court can determine the existence of prejudice or judge the substantiality of petitioner's claim.

Under these circumstances petitioner is not entitled to a hearing under § 2255. *Miller* v. *United States*, 339 F.2d 581 (9th Cir. Dec. 8, 1964); *Wilson* v. *United States*, 338 F.2d 54 (9th Cir. Oct. 23, 1964).

After a careful examination of the Court finds that petitioner's motion and the files and records of his case conclusively show that petitioner is entitled to no relief.

IT IS, THEREFORE, ORDERED that petitioner's application and motion for relief under Title 28 U.S.C. § 2255 be, and the same is hereby, denied.

DATED: June 27, 1966.

THOMAS J. MACBRIDE
United States District Judge

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,410

ADOLPHO RODRIGUEZ, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

OPINION—December 5, 1967

On Appeal from the United States District Court
for the Eastern District of California

Before: JERTBERG and DUNIWAY, Circuit Judges, and WEIGEL, District Judge.

PER CURIAM:

Following a jury trial, appellant was convicted on all counts of an eleven count indictment charging violations of the Federal Narcotics Law, and on June 20, 1963, was sentenced to the custody of the Attorney General for a period of twenty years on each count, the sentences to run concurrently.

On October 31, 1963, appellant filed a motion in this court which, in substance, was a request to permit appellant to file an appeal from the district court judgment after the time set by Rule 37(a) Federal Rules of Criminal Procedure had expired, or, in the alternative, for a writ of habeas corpus. On November 18, 1963, this court denied the motion for lack of jurisdiction, citing *United States* v. *Robinson*, 361 U.S. 220 (1960), and refused to treat the issue as an application for a writ of habeas corpus.

On June 27, 1966, appellant filed a petition in the district court under the provisions of 28 U.S.C. § 2255, re-

questing the judgment of conviction be set aside "so that he would be restored to the status of one whose sentence has just been imposed and who has ten (10) days within which to institute a direct appeal." The petition was denied without a hearing.

Appellant filed a timely appeal and prosecutes his appeal *pro se* and *in forma pauperis*.

In denying the petition the district court stated:

> "Oral notice of appeal was given at the time of sentencing, but petitioner's trial counsel failed to file a written notice of appeal, as provided by Federal Criminal Procedure Rule 37(a). Petitioner alleges: 'Thus, when trial counsel failed to file a written notice of appeal . . . with the knowledge that petitioner could not comply with Rule 37(a)(1), he did with intent and knowledge deprive petitioner of his right to appeal by fraud.'
>
> "The foregoing statement is petitioner's sole ground for relief. He does not assert that the failure to appeal resulted in the loss of a basic right, constitutional or otherwise, for which loss he is entitled to a remedy under § 2255. Petitioner has not, beyond the above conclusory statement, disclosed to this Court the nature of the error and prejudice which he proposes by appeal to correct. Consequently, there is no way in which this Court can determine the existence of prejudice or judge the substantiality of petitioner's claim."

The order of the district court is affirmed on the authority of *McGarry* v. *Fogliani*, 370 F.2d 42 (9th Cir. 1966); *Miller* v. *United States*, 339 F.2d 581 (9th Cir. 1964); and *Wilson* v. *United States*, 338 F.2d 54 (9th Cir. 1964).

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21410

ADOLPHO RODRIGUEZ, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the Eastern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered December 5, 1967

SUPREME COURT OF THE UNITED STATES

No. 227 Misc., October Term, 1968

ADOLPHO RODRIQUEZ, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 749 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 18, 1968

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 330835 425